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No. 89-1696

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

HUBERT C. TAYLOR AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT HUBERT C. TAYLOR IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, regardless of the correctness of the court of appeals' analysis concerning the validity and scope of the rebuttal provisions of the Department of Labor ("DOL") interim regulation at 20 C.F.R. § 727.203, the record nonetheless entitles Taylor to an award of such benefits even under the existing judicial interpretations of those provisions that are least favorable to claimants?

2. Whether the rebuttal provision at § 727.203(b)(2) violates Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f), if construed to permit the opponent of a claim to rebut the presumption of disability solely by medical evidence showing that the miner is physically able to do his usual coal mine work, without any inquiry as to whether jobs entailing such work are available to him?

3. Whether the rebuttal provisions of the DOL interim regulation at 20 C.F.R. §§ 727.203(b)(3) and (b)(4) violate the "not...more restrictive" mandate of Section 402(f)(2) of the Act when applied to claimants who meet the invocation requirements of the HEW interim provision at 20 C.F.R. § 410.490?

4. Whether Section 402(f)(2) of the Act violates the Due Process Clause of the Fifth Amendment to the United States Constitution if construed to prohibit employers from defeating black lung benefit claims by application of any rebuttal provisions in the DOL interim regulation that are "more restrictive" than "criteria" in the HEW interim provision?

PARTIES TO THE PROCEEDING

Hubert Taylor was a claimant for disability benefits under the Act. In the Seventh Circuit below he was the petitioner. In this Court, he is the respondent named in the Petition for a Writ of Certiorari. Because Taylor died, however, Charles Martin ("Martin"), Personal Representative of Taylor's estate, has filed a Motion to Substitute, requesting that he be substituted for Mr. Taylor as the named respondent here. If the Motion To Substitute is granted, Martin will be the named individual respondent in this Court.

The Director, Office of Workers' Compensation Programs (the "Director"), who was a respondent in the Seventh Circuit below, is also a respondent here. See Sup. Ct. R. 12.4.

As set forth more fully in the Petition for a Writ of Certiorari, the petitioners here (who were respondents in the Seventh Circuit below) are the Peabody Coal Company and the Old Republic Insurance Company ("Peabody").

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BRIEF IN OPPOSITION TO A
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT

A. The Black Lung Benefits Act And The Interim Presumptions

Under the Black Lung Benefits Act, 30 U.S.C. §§ 901 et seq. (1982 and Supp. V 1987) (the "Act"), and implementing regulations, [1] coal miners who are or are presumed to be totally

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[1] The two principal regulatory provisions here are 20 C.F.R. § 410.490 and 20 C.F.R. § 727.203. We often refer to them by their popular names: the "HEW interim presumption" or the "HEW interim provision" (§ 410.490) and the "DOL interim presumption" or the "DOL interim regulation" (§ 727.203). We sometimes refer to the four "rebuttal provisions" of the DOL interim regulation (at §§ 727.203(b)(1)-(b)(4)) as the "§ (b)(1)," "§ (b)(2)," "§ (b)(3)," or "§ (b)(4)" rebuttal provisions. When we cite other regulatory provisions of 20 C.F.R. defining eligibility for black lung benefits, we usually omit the 20 C.F.R. reference. Except when we otherwise indicate, all citations to 20 C.F.R. are to the 1989 edition.

disabled due to "pneumoconiosis" [2] are entitled to the benefits the Act provides. Pittston Coal Group v. Sebben, _____ U.S. _____, 109 S. Ct. 414, 418 (1988).

The Sebben Court reviewed the legislative and regulatory history surrounding the adoption of the HEW interim provision at § 410.490 and the DOL interim regulation at § 727.203. 109 S. Ct. at 417-19. As relevant here, the Secretary of Labor adopted the DOL interim regulation in an effort to comply with Section 402(f)(2) of the Act, 30 U.S.C. 902(f)(2), added by the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95 (1978). In Section 402(f)(2), Congress required the Secretary of Labor to develop and apply, to pending, newly filed, and some previously adjudicated claims, interim eligibility standards setting forth "criteria...not...more restrictive than the criteria applicable to a claim filed on June 30, 1973" (i.e., than the criteria applicable to a claim adjudicated under the HEW interim provision at § 410.490). See Sebben, 109 S. Ct. at 418.

In Sebben this Court held that one requirement for triggering, or invoking, the DOL interim presumption violates Section 402(f)(2). 109 S. Ct. at 419-23. However, the Sebben Court expressly declined to address the validity and scope of the rebuttal provisions of the DOL interim regulation. Id. at 423. These rebuttal provisions include two that are not found in the

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[2] The Act defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

HEW interim provision: § 727.203(b)(3), which permits rebuttal by proof that the miner's disability or death did not arise in whole or in part from coal mine employment, and § 727.203(b)(4), which permits rebuttal by proof that the miner does not or did not have pneumoconiosis. In addition, the Director currently interprets the DOL rebuttal provision at § 727.203(b)(2) to permit the opponent of a claim to rebut the DOL presumption solely by making a medical showing that the miner is physically able to do his usual coal mine work. In contrast, the similarly-worded HEW rebuttal provision at § 410.490(c)(2) has been interpreted to require not only such a medical showing but also an economic showing that the miner's usual coal mine work is available to him in the immediate area of his residence. Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983).

B. This Case.

Hubert Taylor was a coal miner. Ap. 31a. He worked in the mines for 42 years, from 1934 to 1976, in a variety of jobs. Id. The last job that he performed over a substantial period of time was that of "ramp operator." Id.

Taylor filed a claim for benefits under Part C of the Act on June 6, 1977. Ap. 29a. The Director approved the claim, but the responsible operator, Peabody Coal Company ("Peabody"), appealed, and a hearing before an Administrative Law Judge ("ALJ") was held. Ap. 30a. Based on Taylor's 42 years of coal mine work and nine x-ray readings of his lungs that were positive for

pneumoconiosis, the ALJ found that Taylor successfully invoked the presumption at § 727.203(a)(1) that he was totally disabled due to pneumoconiosis. Ap. 36a. The ALJ also found that the presumption was not rebutted under § 727.203(b)(1), § 727.203(b)(3), or § 727.203(b)(4). Ap. 37a-38a. However, the ALJ concluded that the presumption was rebutted under § 727.203(b)(2) by medical evidence that, "from a pulmonary standpoint," Taylor could perform his "usual coal mine employment." Ap. 38a. Section 727.203(b)(2) provides for rebuttal if "it is established that the individual is able to do his usual coal mine work or comparable and gainful work."

The ALJ then proceeded to adjudicate Taylor's claim under the HEW interim provision at § 410.490. Finding that Taylor invoked that presumption under § 410.490(b), the ALJ concluded that Peabody had not rebutted the presumption under either of the rebuttal provisions at § 410.490(c). Ap. 39a. The ALJ ruled that the rebuttal provision at § 410.490(c)(2), in contrast to its companion provision in the DOL regulation at § 727.203(b)(2), requires the opponent of a claim to show that the miner is not "vocationally disabled" -- i.e., that the miner's usual coal mine work is available in the immediate area of his residence. Ap. 39a (citing Haywood v. Secretary of Human Services, 699 F.2d 277 (6th Cir. 1983)). Because the record lacked any evidence rebutting Taylor's claim under that standard, the ALJ determined that he was entitled to benefits under § 410.490. Ap. 39a.

Peabody appealed to the Benefits Review Board, which

reversed the ALJ's award of benefits. Ap. 25a-27a.

Pursuant to 33 U.S.C. § 921(c) (as incorporated by 30 U.S.C. § 932(a)), Taylor appealed to the Seventh Circuit, which initially affirmed the Board's decision. Ap. 19a-22a ("Taylor I"). Citing its then recent decision in Strike v. Director, O.W.C.P., 817 F.2d 395 (7th Cir. 1987), the Seventh Circuit agreed with the Board that the ALJ should not have applied the HEW interim provision at § 410.490 to Taylor's claim. Ap. at 21a-22a.

Taylor sought review of the Seventh Circuit's decision in this Court pursuant to 28 U.S.C. § 1254(1) (1964). Ap. 23a. On December 12, 1988, this Court granted Taylor's writ of certiorari, vacated the Seventh Circuit's decision, and remanded the case to that court for "further consideration in light of" its recent ruling in Sebben. Id.

On remand, the Seventh Circuit reversed the Board's decision and reinstated the ALJ's award of benefits to Taylor. Ap. 3a-14a ("Taylor II"). In the court's view, Sebben established that Section 402(f)(2) of the Act was meant to prohibit the Secretary of Labor from imposing on Section 402(f)(2) claimants any more restrictive criteria, whether "evidentiary" or "adjudicatory," than those found in the HEW interim provision, including criteria "applied...on rebuttal." Ap. 11a. Focusing on § 727.203(b)(2), the DOL rebuttal provision that the Board had applied in overturning Taylor's award, the court held that reading the DOL interim regulation to permit rebuttal by "medical evidence

[alone]" would violate Section 402(f)(2) of the Act. Ap. 9a-11a. This was because § 727.203(b)(2)'s companion HEW rebuttal provision, in addition to requiring a medical showing that the miner is able to do his usual coal mine work, also requires a non-medical showing of such ability, Ap. 1a-2a (denying petitions for rehearing), Ap. 9a-11a, [3] apparently a showing that jobs demanding such work are actually available in the immediate area of the miner's residence. 30 U.S.C. § 902(f)(1)(A); 20 C.F.R. § 410.412(a)(1).

Neither the ALJ, the Board, nor the panel in Taylor I ever suggested that Peabody might be able to rebut the DOL interim presumption under any rebuttal provision other than § 727.203(b)(2). Ap. 18a-22a, 25a-27a, 29a-40a. Nor did Peabody or the Director even argue to the court of appeals that Peabody

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[3] According to Peabody, the court of appeals erred by construing Section 402(f)(2) to make medical evidence non-probative under the DOL interim regulation. Pet. at 8-14. Respondent Taylor agrees that such a construction of Section 402(f)(2) would be erroneous. However, the court of appeals' order denying rehearing emphatically rebuffs any notion that Peabody has read the court correctly. In their petitions for rehearing, both Peabody and the Director argued that the court of appeals wrongly construed the HEW rebuttal provisions at §§ 410.490(c)(1) and (c)(2) to "foreclose the use of medical rebuttal evidence" and that such construction, under the "not...more restrictive" mandate of Section 402(f)(2), carried with it the incorrect holding that medical rebuttal evidence was entirely foreclosed under the DOL interim regulation as well. Ap. 1a. But the court's order denying rehearing explained that Peabody and the Director had read the court's opinion incorrectly: "[W]e note that the precise extent to which the HEW regulations allowed rebuttal was not at issue in this case. We held that to the extent the Department of Labor regulations allow rebuttal--when HEW's do not--the Labor rules are invalid. We did not hold that there are no conceivable circumstances under which HEW rules might allow medical rebuttal." Ap. 2a.

might be able to rebut the presumption under any rebuttal provision except § (b)(2). [4] Nonetheless, the court also elected to discuss the third and fourth DOL rebuttal provisions at §§ (b)(3) and (b)(4). According to the court, because §§ (b)(3) and (b)(4) lack parallels under the HEW interim provision, they run afoul of the "not...more restrictive" mandate of Section 402(f)(2). Ap. 11a. The court also expressed its view that striking §§ (b)(3) and (b)(4) from § 727.203(b) would not violate the due process rights of employers like Peabody. A. 11a-13a.

Peabody and the Director both filed petitions for rehearing or rehearing en banc, challenging, inter alia, the court of appeals' holding with respect to the types of evidence that are relevant for rebuttal under § 727.203(b)(2). Peabody Pet. for Rehearing at 6-7 (No. 86-2590); Dir. Pet. for Rehearing at 8-11 (No. 86-2590). According to the Director, the court of appeals erred in holding that rebuttal under the "usual coal mine work" clause of § 727.203(b)(2) must be based on vocational as well as medical evidence. Dir. Pet. for Rehearing at 8-11 (No. 86-2590). On February 1, 1990, the court denied both petitions. Ap. 1a-2a.

Peabody filed a timely petition for certiorari, invoking

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[4] In a footnote to its brief in Taylor I, Peabody correctly observed that § (b)(3) sets forth the requirement that a claimant's disability must be attributable, at least in part, to pneumoconiosis. Brief for Respondents at 10 and n.5, Taylor v. Peabody Coal Co., 892 F.2d 503 (7th Cir. 1989) (No. 86-2590). (citing cases). But Peabody never contended that it could establish rebuttal under that subsection; and indeed it could not. See p.9 infra.

this Court's jurisdiction under 28 U.S.C. § 1254(1) (1964).

REASONS WHY THE COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI

The petition Peabody filed here should be denied because the judgment below is correct without regard to either question that the petition presents. See Section A infra. Peabody's petition presents two questions, a statutory one and a constitutional one. Peabody claims that a circuit conflict exists with respect to the statutory question, which involves the validity and scope of the rebuttal provisions of the DOL interim regulation (§§ 727.203(b)(1)-(b)(4)). Pet. at 8-14. The Director is more precise, correctly pointing out that the DOL interim regulation's rebuttal provisions are the subject of two separate circuit conflicts, one involving the scope of § 727.203(b)(2) ("the § (b)(2) issue") and the other involving the validity of §§ 727.203(b)(3) and (b)(4) ("the §§ (b)(3)/(b)(4) issue"). Dir. Op. Cert. Br. at 6-7, 9-11. No circuit conflict exists with respect to the constitutional question, Pet. at i, [5] a question that, in any event, would not arise unless this Court granted review of the §§ (b)(3)/(b)(4) issue and then resolved that issue against the coal companies.

However, if this Court does not deny the petition in its entirety, and grants review of the §§ (b)(3)/(b)(4) issue in one of the pending cases presenting that issue, then the Court should

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[5] Indeed, the court below is the only court to have passed on the constitutional question that Peabody presents for review or any related constitutional question.

grant review here of the § (b)(2) issue, a narrower statutory issue than the petition raises. See Section B infra. Granting review of the § (b)(2) issue here would make review of the DOL rebuttal provisions complete if the Court also grants review of the separate §§ (b)(3)/(b)(4) issue in one of the pending cases.

A. The Court Should Deny The Petition Here In Its Entirety Because The Judgment Of The Seventh Circuit Is Correct Without Regard To Either Question That The Petition Raises

The facts of Hubert Taylor's claim entitle him to benefits even when all four rebuttal provisions of the DOL interim regulation are applied to his claim and are given the constructions that are the least favorable to claimants that the courts have adopted. Consequently, even if this Court were to overturn the decision below, Taylor would still prevail on his claim for black lung benefits. The judgment of the Seventh Circuit is correct without regard to the statutory question Peabody has framed or to the related constitutional question Peabody also presents. Thus, this case is not a suitable vehicle for resolving either of these questions.

The ALJ found that the evidence in this case does not rebut the DOL interim presumption under three of its four rebuttal provisions: §§ (b)(1), (b)(3), and (b)(4). Ap. 37a-38a. And neither Peabody nor the Director suggested in the court below that the ALJ erred with respect to any of these findings. Indeed, the Director now concedes the correctness of the ALJ's findings with respect to §§ (b)(3) and (b)(4). Dir. Op. Cert.

Br. at 10 n.3. [6]

The remaining DOL rebuttal provision, § (b)(2), provides for rebuttal if "in light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work." § 727.203(b)(2). The ALJ in fact found that Peabody did establish rebuttal under the "usual coal mine work" clause of this provision based on a non-examining physician's statement that, "from a pulmonary standpoint, the Claimant could perform his usual coal mine employment." Ap. 38a (emphasis added). The ALJ relied on the then prevailing interpretation of that provision that the Benefits Review Board had set forth in Sykes v. Itmann Coal Co., 2 BLR 1-1089 (1980). Ap. 37a-38a (citing Sykes). In Sykes the Board had held that § (b)(2) rebuttal could be established by a showing that the miner did not have any respiratory or pulmonary impairments that were, by themselves, totally disabling.

Regardless of whether the rationale of the court below is correct, [7] the court's conclusion that the ALJ erred in finding rebuttal under § (b)(2) is surely correct. The Board's Sykes standard on which the ALJ relied has been completely discredited,

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[6] Peabody cannot rebut under § (b)(1) either. That provision provides for rebuttal if the opponent of the claim can show that the "individual is, in fact, doing his usual coal mine work or comparable and gainful work." Taylor last worked in 1976, Ap. 31a, eight years before his administrative hearing. Ap. 29a.

[7] Respondent Taylor agrees with the court's holding in his case that § (b)(2) rebuttal does not entail a purely medical inquiry. See pp. 22-25 infra.

rejected by every court of appeals to have considered it.[8] Rather, the approved test that the courts have unanimously adopted is simply whether or not the miner is able to engage in his usual coal mine work; the question of causation (i.e., whether the miner's disability was solely the result of respiratory and/or pulmonary impairments) is irrelevant. See cases cited in n.8 supra. Thus, as the Director himself has conceded here, the ALJ applied the wrong test in finding the DOL presumption rebutted under § (b)(2). Dir. Op. Cert. Br. at 12 n.5.

The record unequivocally establishes that Taylor prevails even under the judicial reading of that approved test that favors claimants the least--that § (b)(2) entails a purely medical inquiry and not also an inquiry into whether a claimant's usual coal mine work is actually available to him. Ramey v. Kentland Elkhorn Coal Corp., 755 F.2d 485 (6th Cir. 1985); Taft v. Alabama By-Products Corp., 733 F.2d 1518 (11th Cir. 1984); Director,

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[8] The Board's decision in Sykes was itself ultimately reversed in Sykes v. Director, O.W.C.P., 812 F.2d 890 (4th Cir. 1987). The words of § 727.203(b)(2) do not limit the inquiry under this subsection to whether respiratory or pulmonary impairments, rather than other types of impairment, disable the miners. The Fourth Circuit stated: "[the idea that a] causation requirement may be imported into § 727.203(b)(2)...is belied by the words of the regulation. Thus, Section 727.203(b)(2) is concerned with the question of whether miners are totally disabled for whatever reason. There is no inquiry into causation in a proper § 727.203(b)(2) rebuttal." Id. at 893-894. Following Sykes, every court of appeals to consider the question has agreed. Peabody Coal Co. v. Shonk, 906 F.2d 264 (7th Cir. 1990); Martin v. Alabama By-Products Corp., 864 F.2d 1555, 1557 (11th Cir. 1989); Oravitz v. Director, O.W.C.P., 843 F.2d 738, 740 (3rd Cir. 1988); York v. Benefits Review Board, 819 F.2d 134, 138 (6th Cir. 1987).

O.W.C.P. v. Beatrice Pochahontas Co., 698 F.2d 680 (4th Cir. 1983). The record does not include a single report or testimony by any physician that Mr. Taylor was physically able to do his usual coal mine work. Ap. 31a-39a. [9] Accordingly, Taylor should prevail under § (b)(2) even if this Court ultimately determines that the § (b)(2) rebuttal test entails a purely medical inquiry so that the opponent of a claim need not also make an economic showing that jobs requiring a miner's usual coal mine work are actually available to him.

Peabody seeks review here based on the contention that the court of appeals wrongly, and in conflict with other circuits, invalidated the third and fourth rebuttal provisions of the DOL interim regulation (§§ (b)(3) and (b)(4)) and interpreted the second rebuttal provision (§ (b)(2)) too favorably for claimants. However, we have pointed out that Peabody could not establish rebuttal under any of these provisions even if all of them were applied to Taylor's case and even if § (b)(2) were given the existing judicial interpretation that is least favorable to claimants. Thus, if this Court were to grant review in this case to resolve either of the existing conflicts among the circuits, see Section B infra, the Court would not need to reach the points of the alleged conflicts. Accordingly, this Court should deny

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[9] One non-examining physician, based on his review of Taylor's hospital record and medical tests, testified that Taylor "could perform his job from a pulmonary standpoint." Ap. 34a (emphasis added). The ALJ relied on this statement to find § (b)(2) rebuttal under the now discredited standard that the Board adopted in Sykes.

the writ of certiorari outright.

B. If The Court Does Not Deny The Petition Here In Its Entirety, And Grants Review Of The Question Involving The DOL Rebuttal Provisions At 20 C.F.R. §§ 727.203(b)(3) And (b)(4) In One Of The Pending Cases Presenting That Question, Then The Court Should Grant Review Here Of A Narrower Statutory Question Than The Petition Raises, One Involving The DOL Rebuttal Provision At 20 C.F.R. § 727.203(b)(2)

1. The § (b)(2) Issue. While several other pending cases are potential vehicles for resolving both the constitutional question that Peabody raises and the circuit conflict concerning the DOL rebuttal provisions at §§ 727.230(b)(3) and (b)(4), see Dir. Op. Cert. Br. at 6-7, none of them is a vehicle for resolving the separate circuit conflict concerning the DOL rebuttal provision at § 727.203(b)(2). Indeed, none of them even addressed any issue concerning the validity or the scope of § (b)(2).

This case does present the question whether rebuttal under the "usual coal mine work" clause of § (b)(2) requires a job-availability inquiry. A conflict among the circuits as to this question exists; but to our knowledge, this is the only case pending before the Court that presents the question. We have urged the Court to deny the petition here in its entirety. See Section A supra. However, if the Court were to reject that request, the question here would become whether the § (b)(2) rebuttal question merits plenary review. [10] We submit that it

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[10] For the reasons stated by the Director in his response here, Dir. Op. Cert. Br. at 12, the § (b)(2) question does not carry with it any related constitutional question.

would, at least if the Court grants review of the §§ (b)(3)/(b)(4) issue in one of the cases presenting that issue. [11]

a. The conflict among the circuits involving § (b)(2) is clear. The court of appeals below held that the § (b)(2) rebuttal provision, if read to entail solely a medical inquiry concerning whether a miner is physically able to do his usual coal mine work, violates Section 402(f)(2) of the Act. Ap. 8a-11a, Ap. 1a-2a (denying petition for rehearing). See also n.6, supra; Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983) (rebuttal under "usual coal mine work" clause of § 410.490(c)(2) requires proof that such work is actually available). In contrast, three other circuits have held that Section 402(f)(2) of the Act allows the Secretary to require solely a medical inquiry under § (b)(2) and does not direct the Secretary to require the claimant's opponent to make any economic or other non-medical showing in order to rebut the presumption under the "usual coal mine work" clause of § (b)(2). Ramey, 755 F.2d at 490; Taft, 733 F.2d at 1521-22; Beatrice Pocahontas, 698 F.2d at 682.

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[11] We recognize that it is unusual for a party to request this Court to review a question on which he has prevailed in the court of appeals, as Respondent Taylor has done here. However, we emphasize that we are, in the first instance, requesting this Court to deny Peabody's petition in its entirety and that we only request the Court to grant review of the § (b)(2) issue in this case if the Court declines to deny Peabody's petition. We base this subsidiary request on our best assessment that it is the course most likely to lead to the ultimate resolution of this case in favor of Taylor's estate.

b. Several factors make the § (b)(2) issue an important one. First, the circuit conflict obviously creates substantial administrative inequities in the administration of the black lung benefits program. Moreover, tens, and perhaps hundreds, of millions of dollars are at stake in this Court's authoritative resolution of the § (b)(2) rebuttal issue. Tens of millions are at stake merely in pending cases governed by the DOL interim regulation. [12] In addition, this Court's resolution of the types of inquiry pertinent to rebuttal under the "usual coal mine work" clause of § (b)(2) would likely also inform, and perhaps be decisive of, the judicial interpretation of the identical phrase in 20 C.F.R. § 718.204(b)(1), one of the provisions of the DOL permanent regulations that govern eligibility for all claims filed on or after April 1, 1980. The DOL permanent regulations govern far more claims than the DOL interim regulation does.

c. Presumably, Peabody believes that this Court should grant review of the § (b)(2) issue in this case since the statutory question Peabody presents for review in its petition encompasses all of the rebuttal provisions of the DOL regulation, including § (b)(2). However, the Director has stated his view that granting review of the § (b)(2) issue in this case is "not...necessary." Dir. Op. Cert. Br. at 13. The Director sets

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[12] We estimate that between 500 and 1,000 claims governed by the DOL interim regulation would be affected by this Court's resolution of the § (b)(2) rebuttal issue, putting at issue between $60 million and $120 million. See Dir. Op. Cert. Br. at 9 and n.2 (estimating present value of a single black lung claim at between $118,318 and $185,656).

forth several reasons for this view, none of which is persuasive.

First, the Director asserts that the § (b)(2) rebuttal method is "not as important" as the §§ (b)(3) and (b)(4) methods because §§ (b)(3) and (b)(4) "allow a broader range of rebuttal." Id. However, the estimated $60 million to $120 million at stake in § (b)(2) cases alone certainly appears to be "important" enough to deserve this Court's review. Moreover, the Director's assertion fails to take into account the potential impact that an authoritative resolution of the § (b)(2) issue could have on claims governed by the DOL permanent regulations, all of which must satisfy the "usual coal mine work" clause that § 718.204(b)(1) also includes.

In addition, the Director asserts that "[p]arties contesting eligibility do not frequently succeed under" § (b)(2) and that §§ (b)(3) and (b)(4) "usually provide the only realistic possibilities of rebutting a presumption of entitlement." Id. As support for this assertion, however, the Director cites only a law review article, written by two attorneys who represent coal companies, that sets forth no authority whatever for the proposition. Indeed, at least one of the authors of the article has represented coal companies that, in several reported court of appeals cases alone, successfully defeated claims under the prevailing interpretation of § (b)(2). E.g., Bartley v. L & M Coal Co., 901 F.2d 1311 (6th Cir. 1990); Adams v. Peabody Coal Co., 816 F.2d 1116 (6th Cir. 1987); Ramey, 755 F.2d at 486-488

and nn.3, 7. [13] His experience would appear to belie the unsupported assertion in his article and suggests, consistent with our experience, that many claims have been defeated under the present interpretation of § (b)(2). See also, e.g., Peabody Coal Co. v. Shonk, 906 F.2d 264 (7th Cir. 1990).

The Director also asserts that reviewing the § (b)(2) issue would likely entail "unnecessary complications" for the Court because the court below viewed rebuttal under the DOL interim regulation "broadly." Dir. Op. Cert. Br. at 13. However, the Director has chosen not to specify what the "unnecessary complications" might be. The decision below has not prevented the Director from ascertaining, and informing the other parties of, the precise contours of the § (b)(2) issue--in the Director's words, "whether a coal mine operator must present vocational evidence showing that a claimant can obtain coal mine work in order to rebut the presumption." Id. at 10. And nothing would appear to prevent the parties here from briefing adequately for the Court this well-defined legal issue.

Furthermore, in light of the Director's acknowledgement that this case "turns on" the § (b)(2) issue alone, id. at 8, his suggestion that the Court should hold this case while it reviews the separate §§ (b)(3)/(b)(4) issue in one of the other pending cases, id. at 14, is both anomalous and illogical. We are aware of no case in which any party has contended, much less in which

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[13] Mark E. Solomons, one of the authors of the the article, was counsel for the coal companies in Bartley, Adams, and Ramey, and is counsel of record for Peabody here as well.

any court has held, that § (b)(3) or § (b)(4) entails a vocational inquiry or any other non-medical inquiry. Thus, there is no reason to expect that this Court's resolution of the §§ (b)(3)/(b)(4) issue would undermine the lower court's conclusion that rebuttal under § (b)(2) entails a non-medical inquiry (presumably a vocational or economic inquiry), whether or not such rebuttal entails a medical inquiry as well.

d. In urging this Court not to grant plenary review of the § (b)(2) rebuttal issue, the Director also notes that respondent Hubert Taylor died on April 27, 1988 while his prior petition for a writ of certiorari was pending, but that William Martin, the representative of Mr. Taylor's estate, did not file a motion to substitute himself for Mr. Taylor until May 1990. Dir. Op. Cert. Br. at 13-14. Citing Snyder v. Buck, 340 U.S. 15, 21 (1950), the Director suggests--without making a directed argument to this effect--that this case may have abated under Sup. Ct. R. 35.1 (formerly Sup. Ct. R. 40.1), which provides that "[t]he substitution of a representative of the deceased***must be made within six months after the death of a party, or the case shall abate." [14] If the Court were to accept this suggestion, then presumably it would direct vacation of the court's judgment below. Such a result would defeat both Peabody's request that the Court grant its petition here and Taylor's (Martin's) request

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[14] This Court granted the prior petition for a writ of certiorari on December 12, 1988. Ap. 23a. Accordingly, the case was pending in this Court more than six months after Taylor's death without a substitution motion being filed.

that the Court deny the petition. See Section A supra.

When this case was before this Court in 1988, counsel for Taylor did not file a motion for substitution within the six-month period specified in former Sup. Ct. Rule 40.1 because he overlooked that rule. He apologizes to this Court for his oversight, which he sought to rectify by filing a substitution motion promptly after a repesentative of Taylor's estate was appointed. However, the Director's suggestion that this case should abate is completely without merit.

To begin with, Snyder is wholly inapposite here, both because it construes Section 11(a) of the Judiciary Act of 1925, 43 Stat. 941, 28 U.S.C. § 780 (1946) (governing substitutions for public officers ceasing to hold office), not Sup. Ct. R. 35.1 or any of its predecessors (governing substitutions for parties other than public officers), and because it is a mandamus case. [15] Much more enlightening is Anderson v. Yungkau, 329 U.S.

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[15] The plaintiff in Snyder sought a writ of mandamus to compel a federal official to pay her a widow's allowance. The official retired, and neither party moved to substitute the official's successor within the six-month period that the statute allowed for substitution. In holding that the action abated, the Court enforced the entirely reasonable congressional determination that, when no timely substitution is made for a retired federal official against whom mandamus is sought, then a court should conclude that the action is no longer necessary because the successor official must have been willing to discharge the duty that the retired official had allegedly refused to perform. However, the circumstances that prevail in this suit for statutory black lung benefits are quite different, since the Director has continued to defend both his decision to deny Taylor benefits and the challenged rules that animated that denial. Accordingly, any conclusion that the controversy between the parties here might no longer exist, would be entirely unreasonable. Similarly, unlike Snyder, here it would be unreasonable to presume that the estate no longer desires the

482 (1947). There, this Court addressed the two-year substitution period in former Fed. R. Civ. P. 25(a)(1), [16] which, like current Sup. Ct. R. 35.1, did govern substitutions for parties who were not public officers. And the Court construed the two-year period there as a statute of limitations. 329 U.S. at 485. [17] Significantly, reliance on statutes of limitations can be waived by parties, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1985), which is precisely what happened here. Peabody, the party who is liable for payment of Taylor's claim to benefits, has expressly waived any reliance on

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black lung benefits Taylor sought since the statutory and regulatory scheme here--42 U.S.C. § 404(d), incorporated by reference into 30 U.S.C. § 923(b); 20 C.F.R. § 725.545(c)--provides both that Taylor's claim for benefits survives him and designates the priority order of successor beneficiaries. See Acheson v. Furusho, 212 F.2d 284, 292 (9th Cir. 1954) (even when no timely motion to substitute has been made, abatement under former Sup. Ct. R. 19(4) and § 11(a) of the Judiciary Act of 1925 is appropriate only when it is reasonable to presume that continuation of the litigation would result in a judgment that "would not be effective").

[16] Former Fed. R. Civ. P. 25(a)(1) provided, in relevant part that:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

[17] The text of Sup. Ct. R. 35.1 informs the conclusion that the specified six-month time period is a statute of limitations, since, under the circumstances described in the rule, it provides for an additional "designated time" beyond the six month period in which the substitution may be made. See 42 U.S.C. § 405(g) (requiring that a civil action be filed within sixty days of final administrative decision or such additional time as Secretary of HHS may permit); Salfi v. Weinberger, 422 U.S. 749, 763-64 (1975) (construing 60 day period in § 405(g) as a statute of limitations).

the six-month limitations period in Sup. Ct. R. 35.1. See Petitioners' Memorandum In Response To Motion To Substitute Party (urging that Martin's motion to substitute be granted nunc pro tunc as of the date of Taylor's death). We have found no case holding that, under the rules of this Court, a party's failure to make a timely substitution motion for a party who was not a public officer constituted abatement where the party in whose favor the abatement would have run has waived his timeliness (statute of limitations) objection.

Moreover, assuming that the six-month substitution period in Sup. Ct. R. 35.1 is a statute of limitations, as Anderson suggests it is, then its application must also be guided by "equitable" considerations. Bowen v. City of New York, 476 U.S. 467, 479 (1986). Such equitable considerations strongly counsel against abatement of this case, whether the result of abatement here would be "only" significant additional delay in the litigation of this case or the denial of benefits to Taylor and his estate, or both. Taylor's claim has already been pending for over 13 years, has been twice before the court of appeals, and is now before this Court for the second time. In addition, because Peabody has waived any reliance on the abatement rule--indeed, it has urged this Court to allow this litigation to proceed--the Court can disregard any injury that Peabody may incur because the action is allowed to continue in this Court. Moreover, the Director has effectively conceded that the facts of Taylor's claim would entitle him to the black lung benefits he

sought, see pp. 9,11 supra, and neither Taylor nor his estate has done anything to suggest that this Court should not honor Congress' intent that eligible claimants should receive black lung benefits. Both Peabody and Taylor are urging that this Court's decision finally resolve this case on its merits. Under these circumstances, they should be afforded such a decision, if at all possible.

e. Of the four circuits that have squarely addressed the § (b)(2) rebuttal issue in published opinions, only the court below has reached the correct conclusion. It relied on Section 402(f)(2) of the Act for its interpretation that § (b)(2) is not limited to a purely medical inquiry concerning a miner's ability to do his usual coal mine work. In Sebben, this Court held that, under Section 402(f)(2)'s "not...more restrictive" directive, the "criteria" the Secretary of Labor applies to Part C claims under the DOL regulation must be at least as favorable to the individual claimant as the "criteria" applicable to a claim filed on June 30, 1973 (e.g., under the HEW interim provision). Sebben, 109 S. Ct. at 420-22. Thus, the central issue here is the threshold question--whether the HEW rebuttal provision at § 410.490(c)(2), which parallels the rebuttal provision at § 727.203(b)(2), permits rebuttal solely by medical evidence establishing that a miner can physically do his usual coal mine work.

The only court of appeals that has squarely addressed this

question concerning § 410.490(c)(2) concluded that the party opposing the claim "cannot rebut the presumption of total disability [under § 410.490(c)(2)] unless he demonstrates that the claimant is not vocationally disabled in the immediate area around his home." Haywood, 699 F.2d at 285. In the Haywood court's view, HEW's separate regulation at § 410.412(a)(1) requires this conclusion. Id. [18] The court was correct. Section 410.412(a)(1) defines the "criteria" of § 410.490(c)(2), so that under Sebben principles it also defines the "criteria" that establish the "restrictivity" floor for criteria under § 727.203(b)(2). Section 410.412(a)(1) has this function because, being cross-referenced in § 410.490(c)(2), it expressly defines the phrase "usual coal mine work or comparable and gainful work" in § 410.490(c)(2). Section 410.412(a)(1) defines that phrase to include the requirement that such work be "gainful work in the immediate area of his [the miner's] residence." § 410.412(a)(1). Consequently, to establish that a claimant is able to do his "usual coal mine work" or other "comparable and gainful work,"

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[18] Section 410.412(a) provides:

> "[a] miner shall be considered totally disabled due to pneumoconiosis if: (1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time... ."

(emphasis added). This provision actually has statutory force and effect for all Part C claims because Section 402(f)(2) of the Act, through its "not...more restrictive" mandate, incorporated § 410.490, including its cross-references to § 410.412(a)(1).

the opponent must show at least that "gainful work" of both types exists "in the immediate area of his [the miner's] residence" as well as that the miner is physically able to do it.

Section 410.412(a)(1) implements Section 402(f)(1)(A) of the Act, which the 1972 amendments added to the statute. Pub. L. No. 92-303, § 4(a), 86 Stat. 153. Section 402(f)(1)(A) provides:

> [A] miner shall be considered totally disabled when any respiratory and pulmonary impairment or impairments resulting from employment in a mine or mines prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he has previously engaged with some regularity over a substantial period of time.

30 U.S.C. § 902(f)(1)(A). Like § 410.412(a)(1), its implementing regulation, Section 402(f)(1)(A) of the Act does not distinguish "usual coal mine work" from "comparable and gainful work." Rather, Section 402(f)(1)(A) sets forth but a single category of "qualifying" work, work that qualifies an otherwise eligible miner for benefits because he is unable to perform it. Thus, when § 410.490(c)(2) refers to a miner's "usual coal mine work or comparable and gainful work" and then cross-references § 410.412(a)(1) to define that term, the phrase "usual coal mine work," which nowhere appears either in § 410.412(a)(1) or in Section 402(f)(1)(A) of the Act, must be understood simply as one type of "comparable and gainful work."

The central point in this context is that Section 402(f)(1)(A) of the Act and § 410.412(a)(1) set forth a single category of qualifying work that must be "gainful"--i.e., offer an individual the opportunity to earn income. But work cannot

possibly meet this criterion unless it actually exists. And § 410.412(a)(1) adds the further requirement that such qualifying work must exist in the "immediate area of [the miner's] residence." Accordingly, when Section 402(f)(1)(A) of the Act and § 410.490(a)(1) are scrutinized, claims in which the miner invokes the § 410.490 presumption may not be denied solely by a medical showing that the claimant is physically able to do his "usual coal mine work" or other "comparable and gainful work" absent an accompanying economic showing that both types of work exist in the immediate area of his residence.

The legislative history of the 1972 amendments confirms this understanding of the "criteria" applicable both to Part B claims and, by virtue of the later amendment adding Section 402(f)(2) to the Act, to Part C claims. In particular, in the Conference Report accompanying the 1972 amendment to the statutory definition of "total disability", the conferees stated that a claimant should not be found to be totally disabled if he is "in fact engaging in substantial work involving skills and abilities comparable to those of any mine employment [he worked at regularly]...or if it is clearly demonstrated that he is capable of performing such work and such work is available to him in the immediate area of his residence." H.R. Rep. No. 1048, 92d Cong., 2d Sess. 7 (1972) (emphasis added). [19]

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19 The circuit court decisions holding, contrary to the court of appeals below, that rebuttal under the "usual coal mine work" clause of § (b)(2) only requires a medical showing--Ramey, Taft, and Beatrice Pocahontas--all ignore or slight § 410.412(a)(1), Section 402(f)(1) of the Act, and the legislative

In sum, if the Court does not deny Peabody's petition in its entirety, and grants review of the §§ (b)(3)/(b)(4) issue in one of the pending cases raising that issue, then the Court should grant review in this case of the § (b)(2) issue.

2. The §§ (b)(3)/(b)(4) Issue. The Director adequately describes the separate circuit conflict concerning the § (b)(3)/(b)(4) issue. Dir. Op. Cert. Br. at 6-7. Although the court below addressed the §§ (b)(3)/(b)(4) issue and the constitutional issue related to it, we submit that the court's conclusions with respect to those issues are merely dicta. [20]

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history. All of these cases were incorectly decided for several reasons, including those stated by Judge Jones in his separate opinion in Ramey, 755 F.2d at 493-99.

Ramey, Taft, and Beatrice Pocahontas also ignore or slight the fact that the Director's former position was that rebuttal under the "usual coal mine" work clause of § (b)(2) requires an economic showing. At least as early as 1981, the Director's position was that an opponent of a claim could not rebut under the "usual coal mine work" clause of § (b)(2) solely by showing that the miner was physically able to perform such work. The Director's position was that the opponent also had to show that such work was "available" to him, which, according to the Director, meant not only that such work existed "in the immediate area of his residence," § 410.412(a)(1), but also that "the miner would have a reasonable opportunity of being hired" for such work. Blankenship v. Beatrice Pocahontas Co., 3 BLR 1-773, 781 (1981) (describing, but rejecting, the Director's understanding that rebuttal under the "usual coal mine work" clause of § (b)(2) required such a showing), aff'd sub nom. Director, O.W.C.P. v. Beatrice Pocahontas Co., 698 F.2d 680 (4th Cir. 1983). The Director reversed his position only after, and solely because, two circuits rejected it. Brief for Director at 8, Crider v. Island Creek Coal Co., 723 F.2d 908 (Table) (6th Cir. 1983) (unpublished).

[20] As we have noted at pp. 6-7 supra, neither the ALJ, the Board, the panel in Taylor I, Peabody, nor the Director has suggested that Peabody might be able to defeat Taylor's claim under any rebuttal provision other than § 727.203(b)(2). Ap.

This concern is a factor weighing against the Court's selection of this case as a vehicle for resolving the §§ (b)(3)/(b)(4) issue. If the Court does not deny Peabody's petition here in its entirety, and decides to grant review of the §§ (b)(3)/(b)(4) issue in one of the pending cases, we submit that Bethenergy Mines, Inc. v. Director, O.W.C.P., 890 F.2d 1295 (3d Cir. 1989), petition for cert. filed sub nom. Pauley v. Bethenergy Mines, Inc., 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714), is the most appropriate vehicle for resolving that issue and the constitutional issue related to it. [21]

29a-40a; Ap. 25a-27a; Ap. 18a-22a. See also Dir. Op. Cert. Br. at 8 ("[T]his case turns on a narrow issue relating to the second rebuttal provision [§(b)(2)]"). Consequently, resolving Taylor's case did not require the court of appeals to decide whether Peabody had successfully defeated Taylor's claim under any of the other rebuttal provisions. Nor did the court have to decide the related constitutional issue. Thus, the court's discussions of §§ (b)(3) and (b)(4) and of the related constitutional issue are merely dicta. Cohens v. Virginia, 19 U.S. 6 (Wheat) 264, 399-400 (1821).

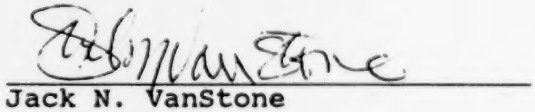
To be sure, in Meyer v. Zeigler Coal Co., 894 F.2d 902 (7th Cir. 1990), petition for cert. filed, _____ U.S.L.W. _____ (U.S. Apr. 27, 1990) (No. 89-7383), the court stated that it had "held in Taylor [II]...that § 727.203(b)(3) was invalid because it violated 30 U.S.C. § 902(f)(2)." Id. at 905 n.3. However, whether a court's statement is holding or dicta should be determined not by the court's characterization of the statement but by whether the court needed to decide the issue in question to resolve the case. United States v. Crawley, 837 F.2d 291, 292-93 (7th Cir. 1988).

[21] We are informed that petitioner Pauley in the Bethenergy Mines case (No. 89-1714) will file a reply to the briefs of the respondents in that case and will discuss, among other things, the reasons for her view that Bethenergy Mines is the most appropriate vehicle for resolving the §§ (b)(3)/(b)(4) issue and the constitutional issue related to it. We agree with what we understand the substance of that discussion will be. In addition, the Bethenergy Mines case is also one of the two pending cases that the Director calls "the strongest candidates

CONCLUSION

The Court should deny Peabody's petition for a writ of certiorari in its entirety. If the Court does not deny the petition here in its entirety, and grants review of the §§ 727.203(b)(3)/(b)(4) issue in one of the pending cases presenting that issue, then the Court should also grant review in this case of the § 727.203(b)(2) issue set forth as question 2 in this brief in opposition.

Respectfully submitted,



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for plenary consideration." Dir. Op. Cert. Br. at 15 n.7. We disagree with the Director concerning his other "candidate," Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114). In our view, Dayton is not an appropriate vehicle for resolving the §§ (b)(3)/(b)(4) issue for reasons that, we understand, will also be set forth in petitioner Pauley's reply in the Bethenergy Mines case.

CERTIFICATE OF SERVICE

Jack N. VanStone hereby certifies that he is a member of the Bar of the Supreme Court of the United States, is the counsel of record for respondent Hubert C. Taylor herein, and that on August 8, 1990, he served three (3) copies of the attached Brief of Respondent Hubert C. Taylor In Opposition upon:

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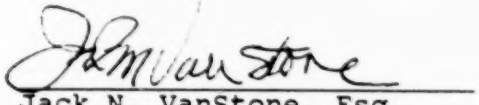
Service was made by depositing these copies in a United States mailbox in Evansville, Indiana, first class postage pre-paid, properly addressed to these parties.



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